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SUPREME COURT OF THE UNITED STATES.

No. 186.

EDWIN G. ADAMS, PLAINTIFF IN ERROR,

vs.

SAMUEL NORRIS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICTS OF CALIFORNIA.

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GIDEON, Print.

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UNITED STATES OF AMERICA,
Northern District of California.

Pleas before the judges of the circuit court of the United States for the districts of California, in and for the northern district, at the court-house in the city of San Francisco, on the twentieth day of January, of January term, in the year of our Lord one thousand eight hundred and fifty-eight.

Witness the Honorable M. Hall McAllister, judge of said court, and Honorable Ogden Hoffman, United States district judge.

NORTHERN DISTRICT OF CALIFORNIA, *ss.*

Be it remembered that at the July term, in the year of our Lord one thousand eight hundred and fifty-six, before the Honorable M. Hall McAllister, judge of the circuit court of the United States for the districts of California, and the Honorable Ogden Hoffman, United States district judge, at the court-house in the city of San Francisco, came Edwin G. Adams and Thaddeus Grimes, by Bates, Lawrence and Hastings, their attorneys, and brought into said court, before the aforesaid judges thereof, their certain bill, complaint, or declaration, against Henry De Cook and Samuel Norris, defendants, of a plea of trespass and ejectment, which said bill was filed April 19th, A. D. 1855, and June 4th, A. D. 1855, and follow in these words, that is to say:

In the Circuit Court of the United States for the Districts of California.

EDWIN G. ADAMS and THADDEUS GRIMES, Plaintiffs,
vs.
HENRY DE COOK and SAMUEL NORRIS, and those holding under him by deeds, or otherwise interested in the rancho "Del Passo," hereinafter mentioned, situate on the north fork of the American river, containing ten square leagues of land.

NORTHERN DISTRICT OF CALIFORNIA, *ss.*

The complaint of Edwin G. Adams, who is a citizen of Templeton, Massachusetts, as assignee of Nathan Grimes, and Eliab B. Andrews, who are citizens of New Hampshire, of Mrs. Nabby Bulkley, formerly Miss Nabby Grimes, who is a citizen of Massachusetts, Esther Hemingway, William G. Bowley, Abner G. Bowley, Mary N. Bowley, and Samuel J. Bowley, Eleanor C. Lane, and Hiram B. Lane, her husband, all of whom are citizens of Vermont, and Thaddeus Grimes, who *are* a citizen of Massachusetts,

plaintiffs in this suit, complains of the above named defendants, and for cause of action says:

That heretofore, to wit, on the first day of January, A. D. 1855, they were, and still are, the owners in fee simple, and lawfully entitled to the possession of the undivided seven-eighths ($\frac{7}{8}$) of that certain parcel of land situate in the county of Sacramento, and State of California, and within the jurisdiction of this court, and known as the rancho "Del Passo," on the north fork of the American river, containing ten square leagues, being the same heretofore granted by Micheltorena, governor of California, to Eliab Grimes, on the 20th day of December, A. D. 1844, and confirmed by the board of land commissioners to the said Norris, by a decree entered in case No. one hundred and forty-six, before said board, and which is appealed therefrom by the United States, appellant to this court. Plaintiffs derive their title to said premises by inheritance, and properly made mesne conveyances from said Eliab Grimes and his heirs.

Plaintiffs further say that said defendant has heretofore unlawfully entered into and upon said premises, and unlawfully withhold and detain the possession thereof from said plaintiff, to his great damage, to wit, two thousand dollars.

Plaintiff further says, this action is brought to recover the possession of said premises, together with his damages for the detention of the same, and that the value of said premises is three thousand dollars.

Wherefore he prays judgment against said defendants, and that they be adjudged to surrender the possession of said real estate to him, and also judgment for damages for the unlawful detention of the same, to the sum of two thousand dollars, and likewise costs of this suit.

BATES, LAWRENCE &
Atty's for Pl'ff.

Summons.

UNITED STATES OF AMERICA.

In the Circuit Court of the United States for the districts of California.

EDWIN G. ADAMS and THADDEUS GRIMES, Plaintiffs,
vs.
HENRY DE COOK et al., Defendants.

Action brought in the said circuit court, and the complaint filed in the city and county of San Francisco, in the office of the clerk of said circuit court.

The President of the United States of America, greeting:

To Henry De Cook and Saml. Norris, and those holding under him, &c.

You are hereby required to appear in an action brought against you by the above named plaintiff in the circuit court of the United States for the districts of California, and to file your plea, answer, or demurrer to the complaint filed therein, (a copy of which accompanies this summons,) in the office of the clerk of said court in the city and county of San Francisco, within ten days (exclusive of Sundays and the day of service) after the service on you of this summons, if resident and served within this county ; or if resident and served out of this county, then within forty days, or judgment by default will be taken against you and each of you.

The said action is brought to recover possession of the undivided seven-eighths of a certain lot of land in the county of Sacramento, State of California, known as the Rancho del Passo, (more particularly described in the complaint,) also damages for the unlawful detention of the same in the sum of two thousand dollars, and costs of this suit; and if you fail to appear and plead, answer, or demur, as herein required, judgment by default will be entered against you and each of you.

Witness the Honorable Roger B. Taney, Chief Justice of the Supreme Court of the United States of America, this twenty-fourth day of October, in the year of our Lord one thousand eight hundred and fifty-five, and of our independence the eightieth.

[SEAL.]

Attest: GEO. PEN JOHNSTON, *Clerk*.

Due service of the within summons and copy of the complaint in this cause is hereby admitted, and I hereby authorize the clerk of this court to enter my appearance therein.

Dec. 26, 1855.

E. D. BAKER,
Att'y for Norris.

And afterwards, to wit, on the 4th day of August, in the year 1856, came the said defendant and made answer, as follows, to wit:

EDWIN G. ADAMS, Pl'ff,
vs.
SAMUEL NORRIS, Def't.

In the Circuit Court of the United States for the districts of California.

The defendant, Samuel Norris, for answer to the plt'ff's complaint filed against him in this action, denies each and every allegation in said complaint contained, and he denies that by his acts

the plt'ff is damaged in the sum of one hundred thousand dollars, or in any other sum, or that he is entitled to the relief demanded.

J. B. HAGGIN,
Att'y for Def't.

And aftewards, to wit, on the first day of September, in the year 1856, aforesaid, came the plaintiff aforesaid, by his attorneys, Howard and Goold, and filed his amended complaint in the cause aforesaid, which said amended complaint is in the words and figures as follows, to wit:

In the Circuit Court of the United States for the districts of California.

EDWIN G. ADAMS, Plaintiff,
vs.
SAMUEL NORRIS, Defendant.
} At Law.

Edwin G. Adams, who is a citizen of the State of Massachusetts, as plaintiff, complains of Samuel Norris, who is a citizen of the State of California, and resident in the northern district thereof, as defendant, who is summoned, &c.

For that heretofore, to wit, on the first day of January, A. D. 1856, in the district aforesaid, the plaintiff was lawfully possessed of the following described real estate, to wit: An undivided seven-eighths of a certain parcel of land situate in the county of Sacramento, in said district, on the north fork of the American river, and known as the "Rancho del Passo," containing about ten square leagues of land, and more particularly described as follows: Commencing on the northern bank of the American river, about one league from its mouth; thence along the course of the river, in the direction of east by south, three leagues; thence towards the north three and one-half leagues; thence towards the west three leagues; thence, in a southerly direction, to the place of beginning, with the appurtenances. And being so possessed thereof, as aforesaid, the said defendant afterwards, to wit, on the third day of January, 1856, unlawfully entered into and upon said premises and ejected the plaintiff therefrom, and does still continue unlawfully to withhold from the plaintiff the possession of said premises, which are of the value of two hundred thousand dollars, to the great damage of the said plaintiff, to wit, in the sum of one hundred thousand dollars.

Wherefore the plaintiff demands judgment against the defendant, that he recover of said defendant the possession of said premises, the damages aforesaid, and the costs of this action.

HOWARD & GOOLD,
Attorneys for Pl'ff.

Service of summons and copy of this complaint hereby acknow-

ledged, the same as if regularly served by the marshal of the U. S.

J. B. HAGGIN,
For S. Norris.

San Francisco, July 30th, 1856.

And afterwards, to wit, on the fifth day of October, in the year one thousand eight hundred and fifty-seven, came the defendant, Norris, and filed the following substitution of attorney, to wit:

Circuit Court of the United States for the districts of California.

EDWIN G. ADAMS
vs.
SAMUEL NORRIS. } At Law.

A. P. Crittenden is substituted as attorney of the defendant, Samuel Norris, in this action, in my place.

J. B. HAGGIN.

San Francisco, September 25, 1857.

(Endorsed:) Notice of the within acknowledged.

E. L. GOOLD,
Att'y for Pl'ff.

San Francisco, September 29, 1857.

And afterwards, to wit, on the twentieth day of January, in the year one thousand eight hundred and fifty-eight, at the court-house aforesaid at San Francisco, before the court aforesaid, the following proceedings were had in said cause, and duly entered of record, to wit:

EDWIN G. ADAMS
vs.
HENRY DE COOK et al. } Common Law.

And now, at this day, come the parties to this cause, by their respective attorneys, and the hearing of the same having been set and postponed from time to time, comes on now to be heard, and the U. S. marshal having returned the venire heretofore issued herein, the following named persons were called, answered to their names, were accepted, rejected, excused, &c., as follows, to wit:

Geo. L. Story, accepted.
David Jones, do.
L. F. Haight, do.
Nathaniel Kelly, excused by def'ts.
Jas. Prichard, accepted.
W. P. C. Stebbins, do.
Henry W. Rook, excused by pl'ff.
Geo. L. Bradley, do def'ts.
F. D. Kohler, accepted.

Jas. Vandyke, accepted.
Wm. Thomas, excused by def'ts.
Jas. Hagan, do by pl'ff.
A. D. Hatch, accepted.
Stephen Thorne, do.
Joseph Vandyke, excused by def'ts.
S. S. McNamee, accepted.
M. E. Tobin, do.

The panel being exhausted, by consent it is ordered by the court, that on filing and entering the following stipulation on the minutes, the cause proceed with eleven jurors.

Circuit Court U. S., dist's of California, northern district.

E. G. ADAMS
vs.
HENRY D. COOK and SAM'L NORRIS.

It is stipulated that this case may be tried by eleven jurors, the 12th being waived.

(Signed) A. P. CRITTENDEN,
Att'y for Def't, Norris.

(Signed) E. L. GOOLD,
For Comp.

The following-named persons were duly empanelled and sworn as jurors herein, viz: Geo. L. Story, F. D. Kohler, David Jones, Jas. Vandyke, L. F. Haight, Jas. Prichard, A. D. Hatch, W. P. C. Stebbins, Stephen Thorne, S. S. McNamee, and M. E. Tobin, and thereupon the hearing of said causes was proceeded with. E. L. Gould, esq., att'y for pl'ff, opened the cause to the jury, and John A. Sutter was duly sworn and examined as a witness on behalf of the plaintiff, and, there not being time to conclude the hearing of the said cause, the same was continued until to-morrow, at 11 o'clock a. m.

And afterwards, to wit, on the sixteenth day of February, of the term and year last aforesaid, at the court-house aforesaid, the cause having been postponed and continued from day to day, the following further proceedings were duly had in said cause, to wit:

EDWIN G. ADAMS
vs.
HENRY DE COOK et als. } Common Law.

And now at this day come the parties to this cause, by their respective attorneys aforesaid, also come the jury heretofore empanelled and sworn herein, and the hearing of said cause was further proceeded with. E. L. Goold, esq., concluded the argument on behalf of the plaintiff; the evidence on both sides being closed, and the cause having been argued by the respective attornies, the court

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charged the jury on the law of the case, and they retired to their room, in charge of the proper officer, to consult upon their verdict.

And now at this day the said jurors come into court, and through their foreman, upon their oaths, do say: "We the jury find for the defendant.

(Signed) "DAVID JONES, *Foreman*."

San Francisco, Feb'y 16, 1858.

Whereupon the jury was discharged from further attendance.

And afterwards, to wit, on the second day of April, in the year 1858, aforesaid, came the plaintiff aforesaid, by his attorneys, Howard and Goold, and filed his bill of exceptions in the cause aforesaid, which said bill is in the words and figures as follows, to wit:

Bill of Exceptions.

In the Circuit Court of the United States for the districts of California, northern district.

EDWIN G. ADAMS vs. SAMUEL NORRIS et al. } January Term, 1858.

Be it remembered, that on the trial of this cause in the court and at the term aforesaid, after the plaintiff had adduced evidence tending to prove the seizin of one Eliab Grimes of the land described in the complaint, of the death of the said Eliab so seized, and of the conveyance thereof by his heirs-at-law to the said plaintiff subsequent to the death of the said Eliab, and prior to the first day of January, 1855, also of the possession thereof by the defendant on that day and at the time of the commencement of this action, and had rested, the defendant to maintain the issue on his part, and for the purpose of showing that his vendor, Hiram Grimes, was vested with the title to said land by devise from the said Eliab, produced two certain documents, in the English language, (respectively marked A and B) in the words and figures following, viz:

A.

This is the last will and testament of me, Eliab Grimes, a citizen of the United States of America, at present residing upon Oahu, one of the Sandwich islands, merchant.

I direct that should my decease occur previous to fifteenth day of December, eighteen hundred and forty-two, that all my property and funds, of whatever name or nature, then invested in the copartnership existing between myself and Josiah Thompson, under the name or firm of Eliab Grimes and Company, of Oahu, Sandwich islands, shall not be withdrawn from said concern until such time as said copartnership shall, by indentures between myself and Josiah Thompson, expire, say on fifteenth day of December, 1842,

but direct that my interest shall be continued in the said concern on account of my heirs hereinafter named, until such period expires. Any personal property, and other of whatever name or nature, not invested in the said concern, I direct, as soon after my decease as possible, by my executors to be reduced to moneys, and all my private debts to be paid; after which, to my niece, Naby Priest, wife of Asa Priest, of Littleton, in the county of Middlesex, Massachusetts, I give and bequeath the sum of one thousand five hundred dollars, to be paid her within one year from the time of my decease: the remainder I give, devise, and bequeath equally to my brothers and sisters hereinafter named. Upon expiration of my said copartnership with Josiah Thompson, should my decease have occurred, I direct my executors hereinafter named to close all my parts of said concern of Eliab Grimes and Company in the Pacific ocean, China, America, and all other parts of the globe where they may have dealing, and reduce the same to moneys with as little delay as possible, and pay the same over to my heirs or their attorneys. I direct my executors, should my decease occur after the fifteenth day of December, eighteen hundred and forty-two, to reduce all and singular my property in all parts of the world, of whatever name or nature, to moneys, with as little loss or delay as possible. I then direct all my just debts, funeral and testimonial expenses paid, balance to be paid over to my brothers and sister as hereinafter named.

I direct that all debts due me from my brother, William Grimes, be forgiven him, and no demand ever made for the same.

To my brothers, William Grimes, Nathan Grimes and Thaddeus Grimes, and my sister Naby Buckley, or to their heirs residing in the United States, with the exception of the one thousand five hundred dollars bequeathed to my niece, Naby *Price*, I give and bequeath all and singular my property, of whatever name or nature, to be equally divided amongst them; to have and to hold the same for their own proper use and benefit forever, subject to the restrictions heretofore named, respecting partnership with Josiah Thompson.

I do appoint, and constitute, and ordain Stephen Reynolds, Josiah Thompson and Hiram Grimes, American citizens, at present residing upon Oahu, one of the Sandwich islands, together with Sidney Bartlett, of Boston, Massachusetts, United States of America, as my true and lawful executors to this my last will and testament, hereby revoking and annulling all other wills and testaments of whatever description by me heretofore made.

In witness whereof, I have hereunto set my hand and seal, at Oahu, one of the Sandwich islands, this fifteenth day of December, eighteen hundred and thirty-six.

ELIAB GRIMES. [SEAL.]

Signed, sealed, published, and declared by the testator, as and for his last will and testament, in the presence of us, who, at his request, in his presence, and in the presence of each other, have subscribed our names as witnesses thereto.

JNO. R. VON PFISTER,
HIRAM GRIMES,
T. K. THOMAS, JR.

The item "five hundred," fourth line from bottom first page, and "five hundred," first line third page, interlined by me on this fifteenth of December, at Oahu, eighteen hundred and thirty-six, in presence of Hiram Grimes, John R. Von Pfister, Josiah Thompson and Thomas K. Thomas, jr.

In witness whereof, I hereunder set my hand and seal in their presence.

ELIAB GRIMES. [SEAL.]

Witnesses to signature and seal of Eliab Grimes:
HIRAM GRIMES,
JNO. R. VON PFISTER,
JOSIAH THOMPSON,
T. K. THOMAS, JR.

B.

Codicil 1st. I give and bequeath to a native woman by name of Velana all the rent and income of my dwelling-house, near to Mr. Fairweather's, now occupied by Mr. Hiram Grimes, during her lifetime; also one cow and one mare, and all their increase; also two China tables, and my bedstead and bedding belonging thereto, my book-case and drawers, six chairs, and one chair for sickness, also seven dollars per month from the time of E. & H. Grimes went into copartnership until she left the store, the first of eighteen hundred and forty-three, revoking my former will.

ELIAB GRIMES.

Witness:
JOHN WILSON, SEN'R.

Santa Barbara, 24 February, 1845.

Also a certain other document, in the Spanish language, marked C, in the words and figures following, viz:

C.

Sello Primero—Ocho Pesos.

Habilitado provisionalmente por la aduana maritima del puerto de Monterey en el departamento de las Californias para los años de mil ochocientos cuarenta y cuatro mil ochocientos cuarenta y cinco.

PABLO DE LA GUERRA.

MICHELTORENA.

{ Aduana Maritima de Monterey. }

Yo Eliab Grimes, cuidadano Mejicano por naturalizacion, teniendo añadir un codicilio a me testamento hech anteriormente, y deseoso, hacerbo en toda forma de ley, establecido en este republica, hago y declaro, de ser de mi voluntad y intencion, en presencia del Señor Alcalde de este jurisdiction, su secretario y dos testigos de asistencia en el modo siguiente:

Codicilio 2d. Doy y endono a Hiram Grimes, mi sobrino, todo el direcho y titulo, que me concedio el gobierno al rancho nombrado el "rancho del Paso" en la Alta California situado en el Rio Americano camo se diseño y consto en el plan y titulo cuyo original existe en los archivos publicos de Monterrey: junto con todo el ganado, caballada y demas eneseres que haya en dicho rancho como tambien todos los edificios y utensilios de labranza y cocina, y cualquiera otra clase de propriedad mio que se encuentre, deduciendo, siempre cierta proporcion de todo el ganado, caballada y demas animales y esquilanos, para los que han tenido cuidado de dicho rancho: en pago de sus servicios segun el convenio hecho.

Y para que conste, firmo, en el modo espresado arriba, hoy, dia, diez y ocho de Abril de 1845, en el pueblo de San Francisco de Asis y a la vez queda depositada una copia en los Archivos del mismo.

ELIAB GRIMES.

Ante mi, en ansencia de los dos alcaldes,
ROBERTO T. RIDLEY,
Sindico.

Testigos:
NATHAN SPEAR,
GUILLERMO HINCKLEY.

Translation.

Seal First—Eight Dollars.

Provisionally empowered by the maritime custom-house of the port of Monterey, in the department of the Californias, for years eighteen hundred and forty-four and eighteen hundred and forty-five.

MICHELTORENA. PABLO DE LA GUERRA.

[SEAL.]

I, Eliab Grimes, a Mexican citizen by naturalization, having to add a codicil to my testament heretofore made, and desirous of doing it in conformity with law established in this republic, do make and declare it to be of my will and intention, in presence of the alcalde of this jurisdiction, his secretary, and two witnesses of assistance, as follows:

Codicil 2d. I give and bestow to Hiram Grimes, my nephew, all

the right and title which the government conceded to me, to the rancho known (or named) as the "Rancho del Paso," in Upper California, situated on the American river, as is delineated and appears in the plan and title, the original of which exists in the public archives of Monterey, together with all the cattle, horses, and other animals that are on said rancho, as also all the buildings and laboring and cooking utensils, and all other property of mine which is met with on said rancho, deducting always a certain proportion of all the cattle, horses, and other animals, and of their produce for those who have had the care of said rancho, in payment of their services, according to the agreement made.

And in order that it may be evident, I sign in the manner above expressed, this 18th day of April, 1845, at the pueblo of San Francisco de Asis, and at the same time there remains deposited a copy in the archives of the same.

ELIAB GRIMES.

Before me, in the absence of the two alcaldes,

ROBERTO T. RIDLEY,
Sindico.

Witnesses:

NATHAN SPEAR,
GUILLERMO HINCKLEY.

And offered to give the said documents in evidence, with proof of their execution, by proving the genuineness of all the signatures.

The plaintiff admitted the genuineness of the signatures to the documents A and B, and they were given in evidence without objection; but the plaintiff objected to the admissibility of document C, upon the following grounds:

1st. Because a paper offered in evidence as a will or codicil without probate, and which has never been duly probated, cannot be admitted in evidence for want of such probate, and does not become a will until probated.

2d. Because the courts of the United States have no probate jurisdiction; and no document or paper purporting to be a will can be probated in any court of the United States.

The court overruled the said objections, and admitted the said document to be given in evidence, and permitted the defendant to offer proof of the execution of said document, the same not having been admitted to probate by any probate or other court.

The complainant then and there immediately excepted to the ruling of the court, and the exception was then and there allowed.

Be it also remembered, that the defendant, upon the trial hereof, at the term aforesaid, to support the issue on his part, offered in evidence, to the court and jury, the testimony of Joseph P. Thomp-

son and of other witnesses, to prove the signatures found upon the said document C, and it was thereupon admitted in open court, by the said defendant, that Guillermo Hinkley, one of the persons whose names purported to be affixed to said document, died in 1846; and the defendant admitted in upon court that the others were all dead, viz: Eliab Grimes, who died in November, 1848, Nathan Spear, who died in the fall of 1849, and Roberto T. Ridley, who died in April, 1852.

The complainant objected to the introduction of said testimony, upon the grounds:

1st. Because the paper offered as a will or codicil does not purport to be a public instrument, authentic, by being executed before a notary public or alcalde under the Mexican law, but a private writing executed in presence of witnesses, and that those witnesses are the only ones that could make proof of such a will under the Mexican law.

2d. Because there is no statement in the paper itself, offered as the codicil C, tending to show that the disposition was dictated by the testator in presence of the witnesses, or read over to the witnesses in the presence and hearing of the testator, they being all together at one and the same time, without interruption or turning aside to any other act, and that having been so dictated or so read over, was declared by the testator to the witnesses to be his last will and testament; and because the proof of the signatures cannot raise a presumption that the witnesses thereto knew the contents of the will, or that the essential formalities required by the Mexican law for the solemnization of the will were, in any respect, observed, and therefore the testimony is irrelevant, incompetent, and inadmissible. And pl'ff further objected to any proof of the execution of the document called the 2d codicil, marked C, on the ground that it does not purport to have been executed in presence of the number of witnesses required by the law in force in California, at the time when it purports to have been made.

The court overruled the said objections, and admitted the testimony, and the complainant immediately excepted to the ruling of the court, and his exception was allowed.

Be it also remembered that on the trial hereof, after introducing evidence tending to prove the genuineness of the signatures of Eliab Grimes and the other persons whose names appear at the foot of the document marked "C," the same being contested by the plaintiff, and alleged by him to have been forged, the defendant introduced and offered to read in evidence the deposition of Samuel J. Hensley, a witness examined on the part of the defendant, in which, amongst other things, the witness testified to the effect that Eliab Grimes a few days previous to his death told the witness that he, Grimes, "had willed his rancho del Paso, with the stock upon it, to his nephew, Hiram Grimes, and made the witness

promise that he, the witness, and Major Reading would assist Hiram Grimes in settling up the business of the ranch with John Sinclair, who owned a third of the stock."

To the reading of this portion of the deposition the plaintiff's attorney objected on the grounds—

1st. That the testimony is mere hearsay.

2d. That *is* does not tend to prove the observance by Eliab Grimes of the formalities required by the Mexican law in the execution of a nuncupative will.

3d. That it does not tend to prove the execution of the codicil marked "C," and is irrelevant and inadmissible.

But the court overruled the objection, and permitted the same to be read in evidence; to which ruling of the court the plaintiff then and there excepted, and the exception was allowed.

Be it also remembered that on the trial hereof, at the term aforesaid, the defendant, to support the issue on his part, offered to the court and jury the testimony of José de Jesus Vallejo, and that of other witnesses, to prove the existence of a custom in California as to the mode of making wills, and the number of witnesses called to act in the making of wills, prior to any change in the Mexican law by the State government.

To the introduction of which testimony the complainant objected on the grounds—

1st. That the mode and manner of making wills being regulated by written law, no custom can be proved to repeal or deviate from said law.

2d. If evidence of custom could be received to override the law, such evidence is to be passed upon by the court and not the jury; and the existence of the supposed custom being taken as evidence of what the law is, the court is to instruct the jury thereupon.

The court overruled the said objections and permitted the defendant to offer said testimony to the jury, and refused to consider the said testimony and instruct the jury that the said supposed custom did or did not exist, but left the said question of custom to the jury; and the complainant immediately excepted to the ruling of the court, and his exception was allowed.

And thereupon the plaintiff objected to the introduction of said testimony on the ground that the same related to the mere understanding of the witnesses as to the custom of the country, and was mere hearsay, and therefore inadmissible.

The court overruled the objection and admitted the testimony; to which ruling of the court the plaintiff then and there immediately excepted, and his exception was allowed.

The testimony being closed on both sides, the plaintiff, by his attorney, prayed the court to instruct the jury as follows:

1st. The document marked C, offered as the second codicil to the will of Eliab Grimes, is void for want of three witnesses of assist-

ance, the least number allowed by the law of California in force at the date of said document, without an escribano or alcalde.

The court refused to give this instruction, but in lieu thereof gave the instruction which is hereinafter set forth on the same point.

2d. The sindico not having professed to act as a witness, and being without authority to act in the capacity assumed by him, is not to be considered a witness to the said document C.

The court refused to give this instruction otherwise than with the modifications hereinafter set forth.

3d. The jury must find that Eliab Grimes himself dictated the contents of said document to the witnesses all assembled together at one and the same time, or that the same was read by him or some one else in his presence and hearing, and that of the witnesses all assembled together at one and the same time, and that the same was understood by him and them, and, so understood by him and them, was declared by him to the said witnesses to be his last will and testament; otherwise said document is null and void, and does not constitute a will.

The court refused to give this instruction as prayed, but did give it with modifications as follows:

The jury must infer from the evidence that Eliab Grimes himself dictated the contents of said document to the witnesses, all assembled together at one and the same time, or that the same was read by him, or some one else in his presence and hearing, and that of the witnesses, all assembled together at one and the same time, and that the same was understood by him and them, and, so understood by him and them, was declared by him to the said witnesses to be his last will and testament, all which is to be gathered from the facts and circumstances of this case, as developed by the testimony; otherwise said document is null and void, and does not constitute a will.

4th. If the jury find that Eliab Grimes did not understand the language in which said document is written, and that there was not present a sworn interpreter who explained and interpreted the same to him in the presence and hearing and understanding of the said witnesses, all assembled together at one and the same time, the said document is null and void, and can have no effect as a will.

The court refused to give this instruction as prayed, but gave it with the following modifications:

If the jury find that Eliab Grimes did not understand the language in which said document is written, and that there was not present any one who explained and interpreted the same to him in the presence and hearing and understanding of the said witnesses, the said document is null and void, and can have no effect as a will.

5th. The jury must find that all the witnesses understood the language in which said document is written, and were able to read and fully understand the contents thereof; and if they or any of them could not read and fully understand the same, such witness or witnesses were incompetent to act as such, and the said document is void.

The court refused to give this instruction as prayed, but gave in lieu thereof the instruction hereinafter set forth on the same point.

6. That even if the jury should find that the signatures to said documents are genuine, they are not permitted to presume from that fact that Eliab Grimes dictated the contents thereof to said witnesses all assembled together at one and the same time, or that the same was read over by him or some one else in their and his presence, and understood by him and them, and being so understood by him and them, was declared by him to the said witnesses to be his last will and testament.

The court refused to give this instruction as prayed.

7. The document C not being authenticated as a public instrument by competent authority, is a mere private writing or memorandum, having no force or validity as a will, though all the signatures thereto be proved genuine, unless accompanied by proof of facts not appearing in any part of said document, or in the attestations thereto, to wit: that the said Eliab Grimes himself dictated the contents of said document to the witnesses all assembled together at one and the same time, or that the same was read by him, or some one else in his presence and hearing, and that of the witnesses all assembled together at one and the same time, and that the same was understood by him and them, and, so understood by him and them, was declared by him to the said witnesses to be his last will and testament.

The court refused to give this instruction as prayed.

8. The statement by a witness of a conversation had with an individual dead at the time of the deposition is the weakest evidence ever received in a court of justice, and is entitled to but little attention.

The court refused to give this instruction as prayed, but gave it with modifications, as follows:

The statement by a witness of a conversation had with an individual dead at the time of the deposition is weak evidence, and is entitled to but little reliance, unsupported by other testimony; such statements ought to be received with the greatest caution. The evidence consisting in the mere repetition of oral statements, is subject to much imperfection and mistake, the party not having clearly expressed his meaning, or the witnesses having misunderstood him.

The court at the request of the plaintiff, amongst other instructions, gave the following:

A sindico had no power, under the Mexican law, to represent the alcalde, and any act of his in attempting to authenticate a will is null and void.

And the court further proceeded to instruct the jury as follows, to wit:

1st. A will executed under the Mexican laws in presence of only two witnesses affords no sufficient proof of its execution.

2. But if you shall be satisfied from the proofs in this case that a uniform and notorious custom existed uninterruptedly for the space of ten years in California, which authorized the execution of wills in the presence of two witnesses only, and which custom was so prevailing and notorious that the tacit assent to it of the authorities may be presumed, then I instruct you that the proof of such a custom, and for such a length of time, will operate a repeal of the prior law, and that two witnesses will be sufficient. On the contrary, if a custom of the character described, and for the period mentioned, has not been proved to your satisfaction, in such case if three witnesses have not attested to the execution of the codicil "C," it is a nullity.

3. If from the evidence, and under the instructions above given, you find three witnesses required under the Mexican law, you will inquire whether each and all of the three witnesses to the will is or are competent. On this point I instruct you that the codicil "C" being written in the Spanish language, should you conclude from the evidence that any one of the three who have attested to this codicil "C" did not speak or read that language, and could not understand the disposition of the property made by it, and that the alleged testator was in the same predicament, then I instruct you that such witness is incompetent to testify to the faithful execution of the instrument, and the testimony of the remaining two, considering Robert T. Ridley, who signed as sindico, as a witness, cannot prove this will, unless you shall come to the conclusion from the evidence in the cause that the Mexican law had been superseded by proof of the custom of the character described.

4. If you are not satisfied that the existence of such a custom has been proved which repealed the Mexican law which required three witnesses to a will, then that law must control this case.

5. The signature of each and every witness of the number you may find necessary, together with that of the testator, must have been satisfactorily proved in order to establish the codicil as a will. The signature of one or more, less than the whole, will only tend to establish the fact that, as regards him or them, the will was well executed, but such proof will not establish the validity of the codicil "C."

6. In relation to the verbal declarations of the testator, they cannot be considered in themselves sufficient proof of the probate or validity of this codicil "C." They are general declarations, the truth of which, if correctly given, comports as well with the existence of any will other than that in controversy. But such declarations may be considered by you when weighing the evidence as to the genuineness of the signatures to the codicil.

7. In relation to a conversation between third parties, alleged by one of the witnesses, Benito Dias, to have taken place in the presence of Eliab Grimes in relation to the will, you will determine from the evidence in the case whether Grimes' knowledge of the Spanish was such as to fix upon him an intelligent assent to what was spoken between other parties in that language; you must receive or reject the testimony as you may find on this point.

8. If the signature of the testator and that of each and every witness of the number you shall, under the instructions given, determine to be necessary, has been proven satisfactorily, and you find each competent, then I instruct you, that from such proof you may presume a due execution of the codicil in the absence of countervailing evidence.

9. That this presumption, sometimes called an "intendment," at others an "inference," is prima facie proof, and exists for practical purposes only so long as there is no evidence to rebut it. If it has been proved that the codicil was written in a language so far unknown to either testator, or one of the witnesses, that they could not read or speak it or understand the dispositions made in it, that no proof other than the legal presumption alluded to has been given to show that by means of an interpreter, or in any other way, a communication as to the contents of the codicil, between the testator and witnesses, did in fact take place, then I instruct you, that if these facts have been proved you must give them their due consideration; and if they, together with a view of all the other facts elicited by the testimony, counteract in your minds the legal presumption which I have instructed you arises out of the satisfactory proof of the signatures of the necessary number of competent witnesses, then such legal presumption will be rebutted. To conclude on this point, if the facts developed in this case satisfy you, that if the attesting witnesses were alive and present, they could not testify to the intelligent dictation or nuncupation by the testator of the disposition made by it of his property to the witnesses, by reading it to them, or by its being read in his or their presence and understood by all, in such case the proof at this time of the handwriting of the deceased witnesses cannot give validity to this codicil. Secondary evidence cannot establish a fact which could not be proved by the primary evidence for which it is substituted.

10. If you find that the law which required three witnesses had not been repealed by proof of the existence of a custom of the char-

acter described, and that each and all of the three witnesses understand the language in which the codicil was written, sufficiently to read it, or hear it read, and by hearing it to understand, from such reading, its terms and the disposition made by them of the property, then admitting the signatures of all to have been proved, I instruct you that three competent witnesses attested the codicil, and it is obnoxious to no objection for want of the requisite number of witness. On the contrary, should you find any one of the witnesses incompetent, then but two remaining, you cannot find in favor of the validity of this will.

11. Whether you find two or three witnesses necessary, if the signatures of each and that of the testator have been satisfactorily proved, then I instruct you, in the language of C. J. Spencer, in Bowen vs. Bell, 19 Johns. 358, it becomes a question of fact, (for you to decide,) whether, under all the circumstances of this case, it is to be presumed that all the essential constituents in the execution of codicil "C" have been complied with?

12. That Robert T. Ridley, if you consider his signature has been proved, is to be taken and considered as one of the witnesses.

The complainant excepted to all of the rulings of the court aforesaid, and excepted to the refusals of the court to give the instructions prayed, and excepted to the modifications of the instructions given as aforesaid, and excepted to the charge given by the court to the jury as aforesaid, commencing at number 1 and ending at number 12 last aforesaid; which exceptions were all taken and all allowed in open court, while the jury were at the bar, and before they had retired to consider of their verdict. And the complainant tendered his bill of exceptions to the rulings, refusals, the modifications of instructions, and the charge of the court aforesaid; which bill is signed, sealed and enrolled, and made part of the record.

M. HALL McALLISTER, [SEAL.]
Judge, &c.

Feb'y 16, 1858.

And afterwards, to wit, on the fifth day of April, in the year one thousand eight hundred and fifty-eight, at the court-house aforesaid, at San Francisco, before the court aforesaid, the following proceedings were had in said cause and duly entered of record, to wit:

EDWIN G. ADAMS
vs.
HENRY DE COOK et als. } Common Law.

And now, at this day, come the parties to this suit, by their respective attorneys, and the plaintiff presented his bill of exceptions, which was signed, sealed, and ordered to be enrolled and made part of the record in this case.

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And on the seventeenth day of February, in the year one thousand eight hundred and fifty-eight, judgment was entered in said cause, in words and figures as follows, to wit:

In the Circuit Court of the United States of America for the districts of California, in and for the northern district thereof.

Judgment.

EDWIN G. ADAMS
vs.
HENRY DE COOK and SAMUEL NORRIS. } Common Law.

This cause being at issue, and having been regularly tried on the issues of law and fact therein, before the honorable the circuit court of the United States of America for the districts of California, in and for the northern district thereof, and a jury duly empanelled and sworn on the twentieth day of January, A. D. 1858, composed of eleven jurors, by order and stipulation entered on the minutes of the said court, and having been, after the evidence was closed, submitted to the jury, and the verdict of the jury having been duly rendered and entered thereafter, to wit, on the 16th day of February, A. D. 1858, whereby the said jury find in favor of the defendants, and against the plaintiff:

Now, therefore, upon motion of the attorneys for the defendants, and by virtue of the premises and verdict aforesaid, it is hereby ordered, adjudged, and decreed, that Edwin G. Adams, plaintiff, do not have or maintain his aforesaid action against Henry De Cook and Samuel Norris, defendants, and take nothing by reason thereof.

And it is hereby further ordered, adjudged, and decreed, that the said Henry De Cook and Samuel Norris, defendants, do have and recover of and from the said Edwin G. Adams, plaintiff, the costs and disbursements of them, the said defendants, in this behalf expended and incurred, to be taxed by the court; and that the said Edwin G. Adams go hence without day.

GEO. PEN JOHNSTON,
Clerk of Cir. Court U. S., Dists. of California.

Dated San Francisco, Cal'a, February 17, A. D. 1858.

And afterwards, to wit, on the thirteenth day of March, in the year one thousand eight hundred and fifty-eight, upon the prayer of the plaintiff, the following writ of error was duly issued in this cause, in the words following, to wit:

UNITED STATES OF AMERICA.

The President of the United States to the Judges of the Circuit Court of the United States for the northern district of California, holden in and for said district and State, greeting:

Because that in the record and proceedings, and also in the ren-

dering of judgment in a suit before you, or some of you, between Edwin G. Adams, plaintiff, and Samuel Norris, defendant, in a plea of trespass in ejectment, manifest error has intervened, to the great damage of the said plaintiff, as in his complaint has been stated; and as it is just and proper that the error, if any there be, should be corrected in due manner, and that full and speedy justice should be done to the parties aforesaid in this behalf, you are hereby commanded, that if judgment thereof be given, then, under your seal, you do directly and openly send the record and proceedings in the suit aforesaid, with all things concerning them, and this writ, so that you have the same before the Chief Justice and the associate justices of the Supreme Court of the United States on the first Monday of December next, at Washington, being the present seat of the national government, that the record and proceedings aforesaid being inspected, they cause to be done thereon what ought to be done.

Witness the Honorable Roger B. Taney, esq., Chief Justice of the Supreme Court aforesaid, at Washington, this 13th day of March, A. D. 1858, and of the independence of the United States the 82d.

GEO. PEN JOHNSTON, *Clerk*.
[SEAL.] Per CUTLER McALLISTER, *D. C.*

And afterwards, to wit, on the nineteenth day of May, in the year one thousand eight hundred and fifty-eight, the following citation upon the aforesaid writ of error was duly issued by one of the judges of said court, in the words following—that is to say:

United States of America to Samuel Norris, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the districts of California, northern district, wherein Edwin G. Adams is plaintiff, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Ogden Hoffman, one of the judges of the circuit court of the United States for the districts of California, northern district, this 19th day of May, in the year of our Lord 1858.

OGDEN HOFFMAN,
U. S. District Judge.

OFFICE OF THE MARSHAL OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

I hereby certify, that I received this citation, and a true, full and correct copy thereof, on May 19th, A. D. 1858, and that on

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the same day I served the said citation on Samuel Norris, the defendant, by exhibiting to him the original citation, and by afterwards, on the same day, leaving with him personally the said copy thereof, in the city of San Francisco, in said district.

San Francisco, May 19th, A. D. 1858.

P. L. SOLOMON,
U. S. Marshal.
By JOHN H. WILLIAMS,
Deputy.

Subscribed and sworn to before me this 22d May, A. D. 1858.

CUTLER McALLISTER, [SEAL.]
U. S. Com'r.

In the Circuit Court of the United States for the districts of California.

I, Geo. Pen Johnston, clerk of the circuit court of the United States for the districts of California, at San Francisco, do hereby certify that the foregoing 49 pages contain a full, correct and faithful transcript of the record of the proceedings had in the above entitled cause, and the whole of it.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at the court-house in the city of San Francisco, this 3d day of June, A. D. 1858, and of the independence of the United States of America the eighty-second.

[L. S.]

Filed 4th September, 1858.